United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8610 139

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Conservator of the Estate of George Thornton Thompson, Incompetent, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED DEC 31 1943

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8610.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Conservator of the Estate of George Thornton Thompson, Incompetent, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT.

Jurisdictional Statement.

This is an appeal from a final order (R. 26-27)[1] and judgment sustaining motion of the United States, defendant below, for Summary Judgment (R. 7) with which was filed affidavit of counsel for defendant (R. 8-9), to Complaint (R. 1-2), in an action instituted under the provisions of Section 19, World War Veterans' Act, 1924, as amended July 3, 1930, Title 38, U. S. C. A. Par. 445, seeking recovery on behalf of the mentally incompetent insured, George Thornton Thompson, under a contract of war risk term insurance. Jurisdiction is invoked under Section 226 of the District of Columbia Code as amended to June 7, 1924.

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(1) Record pages herein refer to the printed pages of Appellant's Appendix.

Statement of Case.

The sole question here involved is whether the court below was justified under Rule 56 of the Rules of Civil Procedure in sustaining appellee's motion for summary judgment (R. 7-8).

The complaint avers (R. 1-2) the insured became totally and permanently disabled on January 1, 1919 while his war risk term insurance contract was in force, that he had been incompetent and insane since December 29, 1923, that claim was filed for insurance benefits by his conservator on June 3, 1931, which was denied on November 13, 1935, thus creating a disagreement as contemplated by Section 19, World War Veterans' Act, 1924, as amended; that suit was filed in the District Court of the United States for the Northern District of Illinois on November 30, 1935, which suit failed for reasons not affecting the merits on January 31, 1940.

The motion for summary judgment avers the pleadings and affidavit filed with said motion (R. 7-8) show there is no genuine issue as to any material fact, the court is without jurisdiction and defendant is entitled to judgment as a matter of law. The affidavit filed with the motion for summary judgment avers (R. 8-9) that suit was filed in the United States District Court for the Northern District of Illinois by this plaintiff seeking recovery of benefits under a $10,000. war risk term insurance contract, which suit, after certain proceedings not here material was dismissed for want of prosecution by that court on January 31, 1940.

Counter affidavit of the attorney who represented this appellant in the Illinois proceeding states that in that proceeding the case was not called for trial, defendant made no motion to dismiss the proceedings, but plaintiff, in an informal manner had asked that the suit be dismissed in advance of trial, in order that a new action might be filed: that defendant's attorney in Illinois objected to having the Order provide, "for reasons not affecting the

merits" and the Court there finally said that he would dispose of it on his own motion, and then dictated the Order on which it was dismissed, stating to counsel for plaintiff and defendant that if there was any question as to whether or not the case had been considered on its merits, that he, the Court, would give a Certificate that the case was not called for trial; that no proceedings were had as affecting the merits, and that it was not, in any event, considered upon the merits; and before this question was raised in the court below, the judge who presided in the Illinois proceeding died, so that it was impossible to procure an Order of Court certifying that the case was not considered on the merits, but affiant stated without equivocation that the case was not considered upon the merits. This counter affidavit was not questioned in the court below by appellee.

The court below sustained (R. 26-27) appellee's motion for summary judgment, holding the court was without jurisdiction to entertain this action.

Statutes and Court Rules Involved.

Section 19, World War Veterans' Act, as amended July 3, 1930 (38 U. S. C. A. Sec. 445) provides:

> "* * * If suit is seasonably begun and fails for defect in process, or *for other reasons not affecting the merits*, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. * * *"
>
> "* * * Infants, *insane persons*, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration *shall have three years in which to bring suit after the removal of their disabilities.* * * *" (Italics supplied.)

The Act of June 19, 1934 (48 Stat. 1064), authorizing the Rules of Civil Procedure provides: "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Rule 56(b), (Rules of Civil Procedure), provides:

"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

Rule 41, (Rules of Civil Procedure), DISMISSAL OF ACTIONS.

"(a) Voluntary Dismissal; effect thereof.

(1) *By Plaintiff; by stipulation.*

Subject to the provisions of Rule 23(c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claims.

(2) *By order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. *Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.*

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, *a defendant may move* for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for

dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Italics supplied.)

Rule 86. "These rules * * * govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

Statement of Points.

1. The insured was an insane person, and as such had 3 years in which to bring suit after the removal of his disability. Hence, the court below had jurisdiction.

2. The previous suit failed for a reason "not affecting the merits" of insured's claim, and as this suit was timely filed, the court erred in denying jurisdiction.

3. The dismissal of the previous suit was accomplished under Rule 41(a) of the Rules of Civil Procedure, consequently was "without prejudice", and the court therefore had jurisdiction.

4. If the foregoing points are held inapplicable, then this court, applying Rule 86 of the Rules of Civil Procedure, should hold that the new Rules of Civil Procedure are inapplicable to the previous case, as their application would work a material injustice and would not be feasible.

Summary of Argument.

I.

The court below had jurisdiction under Section 19, World War Veterans' Act, 1924 as amended July 3, 1930 (38 U. S. C. A. Sec. 445 because:

(a) this insane man had up to three years in which to bring suit after the removal of his disability; and

(b) the previous suit was terminated "for reasons not affecting the merits" of his claim, and this action was timely filed.

II.

The court below had jurisdiction because the previous suit was dismissed pursuant to Rule 41(a) of the Rules of Civil Procedure, and there being no specification in the order of dismissal that such dismissal was with prejudice, the dismissal was without prejudice.

ARGUMENT.

I.

The court below had jurisdiction under Section 19, World War Veterans' Act, 1924, as amended July 3, 1930 (38 U. S. C. A. Sec. 445), because

(A) This insane man had up to three years in which to bring suit after the removal of his disability.

The motion for Summary judgment admits, as alleged in the complaint (R. 2) that the insured was incompetent and insane, and had been since December 29, 1923. This suit was brought by his duly appointed, qualified and acting Conservator (R. 1).

Section 19, World War Veterans' Act, 1924, as amended July 3, 1930 (38 U. S. C. A. Sec. 445) providing:

> "* * * Insane persons * * * shall have three years in which to bring suit after the removal of their disabilities * * *"

is controlling here, and hence protects this insured, making inapplicable the general law which would apply were he a

person *sui juris*. This statute, enacted over 8 years before the Rules of Civil Procedure became applicable, grants to this insured a "substantive right," which is protected from the application of the new Rules of Civil Procedure by the Act of June 19, 1934 (48 Stat. 1064) which authorized the promulgation of said rules. The action of the court below, in dismissing this suit for want of jurisdiction deprived him of this substantive right, and was in error.

There is no time limitation upon suits being filed by or on behalf of an insane person, so long as he continues to be insane, as was this insured. This action of the court below denies to this insane world war veteran the benefit conferred by the above quoted statute, and takes away from this helpless, disabled veteran the rights granted him by this statute. This right was clearly a substantive right, existing 8 years before Congress passed the Act permitting the promulgation of the new Rules of Civil Procedure, which act specifically forbid these rules either abridging or modifying "the substantive rights of any litigant".

B. The previous suit was terminated "for reasons not affecting the merits" of this claim, and this action was timely filed.

This claim was filed June 3, 1931 (R. 2), denied November 13, 1935, and suit was filed in Illinois November 30, 1935. There can be no dispute but that the Illinois action was timely filed, or "seasonably begun" as contemplated by Section 19, World War Veterans' Act, 1924 as amended.

Under the plain wording of the statute, therefore, if this suit begun in Illinois failed for any "reason not affecting the merits" of the claim, a new action may be brought within a year thereafter. The suit in Illinois terminated January 31, 1940 (R. 2), and this suit was filed January 27, 1942 (R. 1). Hence, it was timely filed under the following statute:

> "If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year, though the period of limitations has elapsed."
>
> (Section 19, World War Veterans' Act 1924 as amended July 3, 1930 (38 U. S. C. A. Sec. 445).)

Furthermore, there is nothing in this record to show that this case was dismissed upon a final hearing on the merits, and Mr. Cross's affidavit (R. 19) shows without equivocation that the case was not considered upon the merits. This fact is not disputed, as no counter affidavit was filed.

II.

The court below had jurisdiction because the previous suit was dismissed pursuant to Rule 41 (a) of the Rules of Civil Procedure, and there being no specification in the order of dismissal that such dismissal was with prejudice, the dismissal was without prejudice.

The suit in Illinois was dismissed by Order of the Court, pursuant to the provisions of Rule 41(a) of the Rules of Civil Procedure. This rule provides: "Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." There was nothing specified in the order of dismissal of the Illinois case as to the dismissal being with prejudice, so clearly it was without prejudice. No statutory construction of this plain language of the rule is deemed necessary.

Unfortunately, the judge who tried this case died before this (R. 19) question was raised in the court below, and it was therefore impossible to obtain a modification of the order of dismissal entered in the Illinois suit as suggested by the Commissioner of Veterans' cases in his report to the Court below (R. 26). However, it is shown by the affidavit of Stephen A. Cross, who was counsel for plaintiff in the

Illinois suit, that at his instance the court dismissed (R. 19) this suit by order setting forth the terms the court thought proper; and that no motion to dismiss was made by defendant.

Appellee urged, in the court below, that this dismissal was under Rule 41(b), which rule provides that unless otherwise specified in the order of dismissal, the dismissal operates as an adjudication upon the merits. While appellant feels that this dismissal was under Rule 41(a) for the reasons stated, yet if this is held to be a dismissal under Rule 41(b), then as this suit was filed in Illinois November 30, 1935, (R. 2) it was pending when the new Rules of Civil Procedure took effect, and the application of this Rule 41(b) would clearly work an injustice and would not be feasible, and invoking the provisions of Rule 86 of the Rules of Civil Procedure, said Rule should not be applied to the dismissal of this insane man's case.

Conclusion.

For the reasons stated, it is respectfully submitted that the Trial Court erred in holding it was without jurisdiction to entertain this action, in sustaining the Motion for Summary Judgment, and in dismissing the Complaint; and the action of the lower court should be reversed.

Respectfully submitted,

WARREN E. MILLER,
#1343 H St. N. W., Washington, D. C.,
Attorney for Appellant.

APPENDIX.

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APPENDIX.
Case No. 8610.

1 **Complaint on War Risk Insurance Contract.**

(Filed Jan. 27, 1941.)

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Conservator of the Estate of GEORGE THORNTON THOMPSON, Incompentent, 33 N. LaSalle St., Chicago, Illinois, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant*.	Civil Action No. 9908

1. This suit is instituted under the provisions of Section 19, World War Veterans' Act, 1924, as amended July 3, 1930, Title 38, U. S. C. A., Par. 445.

2. That plaintiff is the duly appointed, qualified and acting Conservator of the estate of George Thornton Thompson, incompetent.

3. That George Thornton Thompson, hereinafter referred to as the insured, while in the military service of the United States during the late World War applied for and was granted a contract of War Risk Term Insurance in the amount of $10,000, said contract providing that in the event of his death while same was in full force and effect, defendant would pay to the person named as beneficiary thereof monthly installments of $57.50 each, until 240 monthly installments in all are paid; and said contract provided that in the event the insured became totally and permanently

disabled while said contract was in full force and effect defendant would pay $57.50 per month as total permanent disability benefits thereunder so long as the insured should remain totally and permanently disabled.

2 4. The insured became and was totally and permanently disabled on January 1, 1919, while the insurance was in force.

5. The insured was incompetent and insane since December 29, 1923.

6. Claim was filed for insurance benefits by the Straus National Bank and Trust Company, then conservator of the estate of the insured on, to wit: June 3, 1931, which claim was finally denied on, to wit: November 13, 1935, thus creating a disagreement as contemplated by Section 19, World War Veterans' Act, 1924, as amended.

7. Suit was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, on said contract by the plaintiff on November 30, 1935, which suit failed for reasons not affecting the merits on January 31, 1940.

WHEREFORE, plaintiff demands:

(1) Judgment against the defendant for monthly installments of $57.50 each commencing January 1, 1919 and continuing until date judgment is rendered herein.

(2) And asks that of the sum for which judgment is given ten per centum thereof shall be deducted therefrom and paid by defendant to plaintiff's attorney as attorney's fees herein and that upon all monthly payments accrued on and after the date of judgment entered herein there shall be deducted from and paid to said attorney a further allowance of ten per centum as attorney's fees.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

/s/ By L. W. Fischer,

Conservator of the estate of George Thornton Thompson, an incompetent.

Warren E. Miller,
1343 H Street, N. W.,
Attorney for Plaintiff.

---

3 State of Illinois, }
County of Cook. } ss.:

I, L. W. FISCHER of the American National Bank and Trust Company of Chicago, Conservator of the Estate of George Thornton Thompson, Chicago, Illinois, do solemnly swear that I have read the foregoing complaint by me subscribed and know the contents thereof; that the matters therein stated of my personal knowledge are true and that matters stated upon information and belief, I believe to be true.

/s/ L. W. FISCHER.

Subscribed and sworn to before
me this 25 day of January, 1941.
/s/ Lucille LeMaire,
Notary Public.

To:
Edward M. Curran,
U. S. Attorney.

Demand is hereby made for jury trial.

/s/ WARREN E. MILLER,
1343 H. St., N. W.,
Washington, D. C.,
Attorney for Plaintiff.

---

4 **Answer.**

(Filed May 27th, 1941.)

Comes now the defendant, United States of America, by the United States Attorney in and for the District of Columbia, and for answer to the complaint filed herein says:

I.

Defendant admits the allegations in paragraph numbered 1 of plaintiff's complaint.

II.

Defendant denies the allegations contained in paragraph numbered 2 of the complaint for the reason that it is without knowledge or information sufficient upon which to form a belief as to the truth thereof.

III.

Answering paragraph numbered 3, defendant admits that while in the military service of the United States George Thornton Thompson made application for and was granted war risk yearly renewable term insurance in the sum of $10,000, upon which premiums were paid to and including December 1918, but specifically alleges that no premiums were paid thereafter.

5 IV.

Defendant denies the allegations contained in paragraph numbered 4 of the complaint.

V.

Defendant denies the allegations contained in paragraph numbered 5 of the complaint.

VI.

Answering paragraph numbered 6 of the complaint it is admitted that a claim for insurance benefits was filed with the Veterans' Administration on June 3, 1931, and finally denied by the Board of Veterans' Appeals on November 13, 1935.

VII.

Answering paragraph numbered 7 of the complaint defendant denies the allegations thereof and for further an-

swer thereto admits and alleges that on November 30, 1935, the American National Bank and Trust Company of Chicago, conservator of the estate of George T. Thompson, incompetent, filed suit against this defendant on said claim in the United States District Court for the Northern District of Illinois, Eastern Division, under Civil Action No. 44981, which suit was tried upon its merits and resulted in a judgment for the defendant on May 18, 1938, from which judgment plaintiff took an appeal to the Circuit Court of Appeals for the 7th Circuit; that on June 13, 1939, the Circuit Court of Appeals reversed the judgment of the District Court and the cause was remanded to the lower court for a new trial; that, thereafter, on January 31, 1940, said suit was, by order of the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissed for want of prosecution. A certified copy of said order of dismissal is hereto attached as Exhibit "A," and made a part hereof as fully and to the same extent as though herein set out verbatim.

6 VIII.

All allegations contained in the complaint not hereinabove specifically admitted are denied.

SECOND DEFENSE.

For further answer herein defendant adopts and incorporates herein, as fully as if restated, the allegations contained hereinabove in paragraph VII of its answer to the complaint and says that the order of dismissal entered on January 31, 1940, in suit No. 44981, by the District Court of the United States for the Northern District of Illinois, Eastern Division, operated as an adjudication upon the merits, and the present suit being upon the same cause of action the aforesaid judgment is *res judicata* as to the cause of action which plaintiff presents herein.

WHEREFORE defendant prays that plaintiff take nothing of and from the defendant, and that defendant recover its costs herein.

A jury is demanded in this action.

EDWARD M. CURRAN,
United States Attorney.

I certify a copy of the foregoing answer has this 27 day of May, 1941, been forwarded to Mr. Warren E. Miller, 1343 H Street, N. W., Washington, D. C.

J. B. COSTELLO,
Attorney for the Department of Justice.

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7 IN THE DISTRICT COURT OF THE UNITED STATES.
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

January 31, 1940.

Present: Hon. Charles E. Woodward,
Judge.

AMERICAN NATIONAL BANK & TRUST CO. OF CHICAGO, Conservator of the Estate of GEORGE T. THOMPSON, Incompetent, vs. UNITED STATES OF AMERICA.	No. 44981 Filed May 27, 1941.

This cause being called for trial and the Plaintiff failing to prosecute its suit in this behalf IT IS ORDERED by the Court that this suit be and hereby is dismissed for want of prosecution without costs therefore IT IS CONSIDERED by the Court that the Defendant go hence without day and without its costs.

8 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

I, HOYT KING, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 31st day of January, A. D., 1940, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 5th day of February, A. D., 1940.

/s/ HOYT KING,
Clerk.

Northern Dist. Illinois 1855)

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9 **Defendant's Motion for Summary Judgment.**

To:

Warren E. Miller, Esquire,
Peoples Life Insurance Building,
Fourteenth and H. Streets, N. W.,
Washington, D. C.

Please take notice that, upon the complaint and answer filed herein and upon the attached affidavit of James B. Spell, Attorney, Department of Justice, the defendant moves this Court for an order giving summary judgment to the defendant, pursuant to Rule 56 of the Federal Rules of Civil Procedure, because the pleadings and the said affidavit attached to this motion show that there is no genuine

issue as to any material fact, that the Court is without jurisdiction and that the defendant is entitled to a judgment as a matter of law, and for such other and further relief as to the Court may seem just and proper.

EDWARD M. CURRAN,
United States Attorney,
Attorney for Defendant.

I certify that copies of the foregoing motion, attached affidavit, and defendant's points and authorities in support of the motion, were served by mail upon Mr. Warren E. Miller, 1343 H. Street, N. W., Washington, D. C., Attorney for Plaintiff, this 7th day of January 1943.

JAMES B. SPELL,
Attorney, Department of Justice.

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10 **Affidavit.**

James B. Spell, after being first duly sworn, upon oath deposes and says that on November 30, 1935, the American National Bank and Trust Company of Chicago, as conservator of the estate of George T. Thompson, incompetent, filed suit against the United States of America in the United States District Court for the Northern District of Illinois, Eastern Division, under Law No. 44981, seeking recovery of benefits under a $10,000 contract of war risk yearly renewable term insurance granted the insured, George Thornton Thompson, who is the same person as George T. Thompson, while in the military service of the United States; that a certified copy of the complaint filed therein marked Defendant's Exhibit "A" is attached hereto and made a part hereof; that the Defendant's answer, which was responsive to the allegations of the complaint, was filed therein on May 17, 1938; that a certified copy of said

answer marked Defendant's Exhibit "B" is attached hereto and made a part hereof; that said suit was tried upon its merits and resulted in a judgment in favor of the defendant on May 18, 1938, from which judgment the
11 plaintiff took an appeal to the Circuit Court of Appeals for the 7th Circuit; that on June 17, 1939 the Circuit Court of Appeals reversed the judgment of the District Court and the cause was remanded to the lower court for a new trial; that a certified copy of the docket entries of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, marked Defendant's Exhibit "C" is attached hereto and made a part hereof; that on January 31, 1940 said suit was, by order of the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissed for want of prosecution; that a certified copy of said order of dismissal marked Defendant's Exhibit "D" is attached hereto and made a part hereof.

JAMES B. SPELL,
Attorney, Department of Justice.

Subscribed and sworn to before
me this 7th day of January 1943.
Dorothy H. Monagan,
Notary Public in and for the District of Columbia.

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28 **Report of Commissioner Upon Defendant's Motion for Summary Judgment.**

(Filed March 2, 1943.)

The suit was filed January 27, 1941.

The ground of recovery alleged in the complaint is that the insured (who had been incompetent and insane since December 29, 1923) became permanently and totally disabled on January 1, 1919, while his contract of war risk term insurance was in force.

After alleging that the plaintiff had a disagreement as to his claim with the Veterans Administration, the complaint states:

> 7. Suit was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, on said contract by the plaintiff on November 30, 1935, which suit failed for reasons not affecting the merits on January 31, 1940.

The defendant filed an answer, which averred that the suit in Illinois was instituted November 30, 1935; that said suit was tried upon its merits and resulted in a judgment for the defendant by said District Court; that
29 said judgment was reversed by the Circuit Court of Appeals on June 13, 1939, and a new trial ordered; and that thereafter, on January 31, 1940, said suit was dismissed by the District Court for want of prosecution.

The answer further averred that said order of dismissal operated as an adjudication upon the merits, and was *res judicata* as to the present action.

Attached to defendant's answer is a certified copy of said order of dismissal, which reads:

> This cause being called for trial and the Plaintiff failing to prosecute its suit in this behalf IT IS ORDERED by the Court that this suit be and hereby is dismissed for want of prosecution without costs therefore IT IS CONSIDERED by the Court that the Defendant go hence without day and without its costs.

On January 7, 1943 defendant filed a motion for summary judgment in the case at bar, under Rule 56 of the Federal Rules of Civil Procedure, together with an affidavit in support of said motion, which affidavit contains certified copies of the proceedings in the Illinois suit.

Said motion alleges that said affidavit and the pleadings herein show that there is no genuine issue in this suit as to any material fact; that the court is without jurisdiction of

this case, and that defendant is entitled to judgment as a matter of law.

COMMISSIONER'S OPINION.

In my opinion defendant's motion for summary judgment should be granted.

Plaintiff asserts that the dismissal of the suit in Illinois for want of prosecution was for a reason not affecting the merits, within the meaning of the following provision of Section 19 of the World War Veterans Act, 1924, as amended July 3, 1930 (38 U. S. C. Sec. 445), prescribing limitations on the bringing of this class of suits:

> If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed.

30 Defendant, on the other hand, contends that since the order of the District Court in Illinois dismissing the former suit for want of prosecution did not state otherwise, said dismissal operated as an adjudication on the merits of the claim presented in that suit (and here reasserted), under Rule 41(b) of the Federal Rules of Civil Procedure, which reads:

> *Rule 41. Dismissal of Actions.*
>
> * * * * *
>
> (b) INVOLUNTARY DISMISSAL: EFFECT THEREOF.
>
> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dis-

> missal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

In reply, plaintiff contends that said Rule does not apply to the proceedings in this case because plaintiff's right to institute the present suit is a "substantive" one and protected by the Act of June 19, 1934 (48 Stat. 1064), authorizing the Supreme Court to prescribe said Rules, which Act contained the following provision:

> * * * Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

The Rules of Civil Procedure provide:

> *Rule 1. Scope of Rules.* These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

As suits in the District Courts under Section 19 of the World War Veterans Act are not among the exceptions stated in Rule 81, it follows that said Rules are applicable to such suits *in so far as they "neither abridge, enlarge, nor modify the substantive rights of any litigant."*

It is quite evident that in promulgating Rule 41(b) the Supreme Court was of opinion that, generally speaking at least, no substantive right of a litigant was impaired by the provision in said Rule that the dismissal of a
31 suit for want of prosecution should operate as an adjudication upon the merits, unless the District Court specified otherwise in its order of dismissal.

However, while such may be the case so far as concerns the general run of civil actions, it cannot be said to be the case where, as in Section 19 of the World War Veterans Act, Congress has given a special class of persons (like the

veterans, to whom its relation has been described as "avuncular"), the privilege of bringing a new suit against the United States to enforce their contract rights, if the first suit were seasonably brought and failed for reasons not affecting the merits, even though the period of limitations had elapsed.

The right thus granted claimants to bring a new suit on the insurance contract, under the circumstances stated, is clearly as much a substantive one as the right granted them to bring the original suit.

If, therefore, the provision of Section 19 of the World War Veterans Act in question covers a case like the present, plaintiff had an undoubted right to bring the pending action.

The ultimate question here, therefore, is whether the dismissal of the Illinois suit for want of prosecution constituted a failure thereof for a reason not affecting the merits, within the meaning of said provision.

In my opinion this question should be answered in the negative.

The manifest purpose of said provision—as illustrated by the specific instance given therein of a reason not affecting the merits, to wit, defect in process—is to enable a claimant under a contract of war risk insurance to obtain a decision by a District Court on the merits of his claim where his first suit, though seasonably brought, has failed for some defect or insufficiency which, although it did not go to the merits of the claim, nevertheless required the dismissal of the case.

Undoubtedly said provision is to be liberally construed to accomplish that purpose.

But it was not, I think, the purpose of said statute
32 to enable a claimant under the insurance contract—
whose original suit was not subject to dismissal on any technical or jurisdictional ground, and who had had

ample opportunity to obtain a decision on the merits of his case—to abandon or discontinue the prosecution of said suit *without adequate cause,* and then, upon its unqualified dismissal by the court for want of prosecution, to assert precisely the same claim in another suit, either in that or some other district, although a new suit on said claim was barred by limitations.

Such a view would operate to put a premium on delinquency and neglect on the part of plaintiff in the first suit for which there was apparently no excuse.

The requirement that the first suit must have been "seasonably brought," shows that Congress, in said statute, was not seeking to protect claimants who were negligent in asserting their claims under the insurance contract, but those who were *diligent.*

In other words, a claimant who permits his case to be dismissed by the court because of his failure to prosecute it with reasonable diligence, or simply because he prefers to sue in another jurisdiction—although the Government may object to such procedure and the court will not sanction it—does not come within the purpose of the provision in Section 19 of the World War Veterans Act here involved.

The decision of the Circuit Court of Appeals for the Tenth Circuit, in the *Dumas, Craig and Graham Cases,* 103 F. 2d 676, is in line with this construction of said provision.

In those cases (which were disposed of in one opinion) it was held that a dismissal of a suit on a war risk insurance contract for failure to revive the action, after the death of the plaintiff, within the time prescribed by the new Rules, was for a reason not affecting the merits, and therefore within the provision of Section 19 of the World War Veterans Act here relied on.

In disposing of the Graham case, the Circuit Court of Appeals said:

> Counsel for the United States contend that the plaintiffs by failing seasonably to revive the original ac-

tions manifest an intention to abandon them. Abandonment was not set up as a ground in any of the motions to dismiss and in none of the cases did the trial court expressly find abandonment.

The fact that the plaintiffs relied on 28 U. S. C. A.
33 Sec. 778 and prosecuted appeals from the orders of dismissal in two of the cases, and promptly commenced the new actions when the right to revive under the federal statute was denied by this court, in our opinion refutes any intention to abandon.

Richards v. Maryland Insurance Co., 8 Cranch. 84, is distinguishable. In that case there was a voluntary abandonment of the action in that the successor made no effort to revive it after the death of the original plaintiff. In the instant cases, the plaintiffs endeavored to revive the actions, failing to act in time due to a mistake as to the applicable statute. In that case the second action was not within the letter of the statute. The instant cases are within the letter of the statute, having failed for "reasons not affecting the merits."

Kemp v. United States, 7 Cir., 77 F. 2d 213, is also distinguishable from the instant cases. There the plaintiff voluntarily dismissed the first action. Here the successors undertook to revive and the actions were dismissed over their objections.

It will be noted that the Circuit Court of Appeals evidently thought that the abandonment of a case, or its voluntary dismissal by the plaintiff, would not be within the purpose of the statutory provision here in question.

In *Derrin v. United States,* 41 F. Supp. 530, decided October 27, 1941, the U. S. District Court for Oregon took a different view of a case similar to the Dumas and other cases decided by the Tenth Circuit, said District Court holding that the unqualified dismissal of the first suit, upon the ground that it was not revived in time, operated as an ad-

judication upon the merits, under Rule 41(b), despite the fact that the Government had requested the court to direct that the new Rules should not apply, and the orally expressed desire of the court that plaintiff should not be prevented from filing a new suit under the provision of Section 19 of the World War Veterans Act here in question.

In the Derrin case the District Court said:

> Since the court did not grant the government's motion to remove the former case from the operation of the Rules of Civil Procedure, the proceedings were subject thereto by force of Rule 86. The question is whether the dismissal of the former action was a judgment "not affecting the merits." Rule 41(b) provides as to the involuntary dismissal in part, "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."
>
> The court did not otherwise specify in its order for dismissal and, therefore, by force of the rule, the dismissal operated as an adjudication upon the merits. The case of *Dumas vs. United States,* 103 F. (2d) 676, and two other cases included in the same opinion are in a different situation. In none of these was the dismissal covered by Rule 41(b). The judgment in the instant case was, then, a judgment on the merits.

34 According to the certified copy of the docket entries in the first suit brought by the present plaintiff in Illinois, attached to defendant's motion for summary judgment, the following proceedings occurred after the reversal of said case by the Circuit Court of Appeals:

7–11–39	Filed Mandate U. S. C. C. A.—Judgment Dist. Court reversed, J. S. 5.
1– 4–40	By agt. of counsel above cause set for trial Jan. 31st, 1940—10 A. M. Woodward, J.

1– 8–40 Mailed notice to Attys.
1–31–40 Cause called for trial—dismd. for want of prosecution. No costs. (JS6) Woodward, J.
2– 2–40 Mailed notice to Attys.
2– 5–40 Iss. 2 cer. copies order of dismissal to U. S. Atty.

Apparently neither party was in court when the case was called and dismissed; nor, apparently, was any effort subsequently made by the plaintiff to have the order of dismissal worded otherwise, under Rule 41(b), or to have the Court direct that the new Rules should not apply.

The word "fail," as used in the statute, implies some defect or deficiency in the proceeding which causes it to become abortive before a decision on the merits can be reached—such as lack of the jurisdictional disagreement with the Bureau, want of proper parties, defect in process, and the like; not the failure of the plaintiff to prosecute a perfectly sound suit of which the court has jurisdiction.

Inability on the part of the plaintiff, when the case is called for trial, to produce a material witness or essential evidence, for reasons not due to his negligence, might also come within the statute. But the voluntary dismissal of the suit by the plaintiff for no such cause, or the involuntary dismissal by the court for want of prosecution, without a saving clause, does not, in my judgment, come within the statute.

35 CONCLUSION.

For the reasons stated above, I recommend that defendant's motion for summary judgment be granted and this suit dismissed.

Respectfully submitted,

WILLIAM R. HARR,
Commissioner of Veterans' Cases.

cc Warren E. Miller,
Attorney for Plaintiff.

Edward M. Curran,
United States Attorney,
c/o Major Joseph H. San.

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36 **Affidavit of Stephen A. Cross.**

(Filed Apr. 16, 1943.)

State of Illinois, }
County of Cook. } ss.:

STEPHEN A. CROSS, being first duly sworn on oath, deposes and says that he was the Attorney of Record in the action filed in the District Court of the United States, for the Northern District of Illinois, and which was dismissed on, to-wit: January 31, 1940.

Affiant says that he was present in Court and participated in the discussion before the Judge, the Honorable Charles E. Woodward, who has since died, and that the case was not called for trial; that the Defendant made no motion to dismiss the proceedings, but that the Plaintiff, in an informal manner, had asked that the suit be dismissed in advance of trial, in order that a new action might be filed; that the Defendant's Attorney objected to having the Order provide, "for reasons not affecting the merits," and the Court finally said that he would dispose of it on his own motion, and therefore dictated the Order on which it was dismissed.

Affiant further says that the Court then stated to both Counsel for the Plaintiff and Defendant that if there was any question as to whether or not the case had been considered on its merits, that he, the Court, would give a Certificate that the case was not called for trial; that no pro-

ceedings were had as affecting the merits, and that it was not, in any event, considered upon the merits.

Affiant further states that before this question was raised in the District Court for the District of Columbia, the Honorable Charles E. Woodward, the presiding Judge, died, so that it is impossible for him to procure an Order of Court certifying that the case was not considered on the merits.

This affiant, however, states without equivocation, the case was not considered upon the merits.

Further affiant sayeth not.

/s/ STEPHEN A. CROSS.

Subscribed and sworn to
before me this 30 day
of January, A. D. 1943.
/s/ Edward J. Callahan,
Notary Public.

Service of a copy of the foregoing affidavit, acknowledged this 16th day of April, 1943.

EDWARD M. CURRAN,
United States Attorney.

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37 **Supplemental Report of Commissioner Upon Defendant's Motion for Summary Judgment.**

(Filed April 26, 1943.)

At the hearing by Judge Letts on April 16, 1943 of defendant's motion for summary judgment (theretofore favorably reported upon by your Commissioner), counsel for plaintiff raised an additional ground for overruling said motion, based upon the incompetency of the insured veteran, of whose estate the plaintiff Bank is conservator, and Judge Letts stated that he would like to have the benefit of the Commissioner's opinion on that point.

Since then plaintiff has filed points and authorities in which the question of incompetency is discussed.

In said points and authorities plaintiff contends that the dismissal of the suit in Illinois was under Rule 41(a) and not Rule 41(b) of the Federal Rules of Civil Procedure, and hence the dismissal of said suit was without prejudice to the bringing of the present action.

I.

38 *As to what Bearing the Incompetency of the Insured Veteran has upon This Litigation.*

In its points and authorities plaintiff states:

> This suit was instituted by the Conservator of the Estate of the Mentally Incompetent. The complaint alleges in Paragraph 5 that the insured has been incompetent and insane since December 29, 1923.
>
> Section 19, it is respectfully submitted, being a remedial statute, should be liberally construed.
>
> Section 19 of the World War Veterans' Act of June 7, A. D., 1924, and amendatory acts, provides:
>
> > " * * * Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities. * * *"
>
> It is urged that by virtue of the above quoted provision of law the status of this insured differs from that of a sane individual and as suit could be brought on his behalf up until three years after the removal of his disability, that even conceding for the purpose of argument (which plaintiff does not admit) that this case would be barred if person *sui juris* were bringing suit, yet in this particular case this insured being an insane person, makes inapplicable the general law which would be otherwise applied here.

In my opinion the fact that the plaintiff Bank is bringing this suit as conservator of the estate of an incompetent veteran, does not remove this litigation from the application of Rule 41(b) of the Federal Rules of Civil Procedure.

As pointed out in my original report, actions on contracts of war risk insurance granted by the United States are subject to the Federal Rules of Civil Procedure unless said Rules impair a substantive right of the insured, or of others claiming under the insurance contract; hence the present action would not lie unless it came within the provision of Section 19 of the World War Veterans Act, 1924, as amended, authorizing the bringing of a new suit within a year where the original suit was reasonably filed and "failed" for a cause not affecting the merits, which I concluded was not the case here.

39 The provision in Section 19 of the World War Veterans Act as to infants, insane persons and other incompetents does not, I think, alter this situation, since said provision merely gives such persons three years in which to bring suit after the removal of their incompetency.

It is true that in view of said provision there is no time limitation upon suits brought by or on behalf of an infant or other incompetent, so long as his disability continues. But that does not mean that the guardian of an infant or the conservator of an incompetent veteran's estate may bring as many actions on the insurance contract as he may please, or that the person authorized to represent such an incompetent, or to conserve his estate, has any greater rights in the prosecution of an action on the insurance contract in the incompetent's behalf than a competent veteran, or a competent beneficiary of the insurance contract, would have.

The original action brought by the plaintiff Bank in Illinois, as conservator of the estate of the insured incompetent, was authorized by the long established jurisdiction

of a court of equity to entertain suits for the protection of the rights of infants or other incompetent persons during their minority or incompetency, when instituted in their behalf by competent persons, such as next friend, guardian or committee, or as conservator of the insured's estate.

But such suits, when so brought, are subject to the same rules of procedure as suits brought by competent persons in their own behalf, the only difference being that, since the property rights of an infant or other incompetent are involved, the courts feel it their duty to scrutinize such proceedings more rigidly, so that the rights of the infant or other incompetent involved may be adequately protected.

There is therefore, as I view it, nothing in the legislation of Congress with respect to suits on contracts of war risk and other Government life insurance which takes such suits out of the operation of the Federal Rules of Civil Procedure, except the provision in Section 19 of the World War Veterans Act as to the bringing of a new suit on the
40 insurance contract where the first suit was seasonably filed but failed for defect in process or other reason not affecting the merits.

If I am right, therefore, in my view that the unqualified dismissal by the District Court in Illinois of plaintiff's original suit on the insurance contract for want of prosecution does not come within the scope of said provision of Section 19 of the World War Veterans Act, this court is without jurisdiction of the present action, notwithstanding the estate of an incompetent veteran is involved.

II.

Whether the Dismissal of the Illinois Action was Under Federal Rule 41(a) or 41(b).

In its points and authorities plaintiff's attorney states:

> Further, it is plaintiff's contention that as no motion to dismiss was made by defendant, dismissal here

by the court [in Illinois] was under Rule 41(a) instead of under Rule 41(b) of the Rules of Civil Procedure and there is attached a copy of affidavit which was filed in Court before argument, which was not previously considered by the Commissioner.

The affidavit referred to in the above statement was executed on January 30, 1943, by Stephen A. Cross, the attorney of record for the plaintiff Bank in the Illinois suit. Said affidavit states:

Affiant says that he was present in Court and participated in the discussion before the Judge, the Honorable Charles E. Woodward, who has since died, and that the case was not called for trial; that the Defendant made no motion to dismiss the proceedings, but that the Plaintiff, in an informal manner, had asked that the suit be dismissed in advance of trial, in order that a new action might be filed; that the Defendant's Attorney objected to having the Order provide, "for reasons not affecting the merits," and the Court finally said that he would dispose of it on his own motion, and therefore dictated the Order on which it was dismissed.

Affiant further says that the Court then stated to both Counsel for the Plaintiff and Defendant that if there was any question as to whether or not the case had been considered on its merits, that he, the Court, would give a Certificate that the case was not called for trial; that no proceedings were had as affecting the merits, and that it was not, in any event, considered upon the merits.

Affiant further states that before this question was raised in the District Court for the District of Col-
41 umbia, the Honorable Charles E. Woodward, the presiding Judge, died, so that it is impossible for him to procure an Order of Court certifying that the case was not considered on the merits.

> This affiant, however, states without equivocation, the case was not considered upon the merits.

Manifestly, the purpose of filing said affidavit in the present action is to avoid, if possible, the effect under Rule 41(b) of the unqualified dismissal of the Illinois suit by District Judge Woodward for want of prosecution.

Obviously said affidavit cannot avoid the effect, under the Federal Rules, of the action taken by Judge Woodward in the Illinois suit, as shown by the certified copies of the proceedings in said suit which have been filed by defendant in the present suit in this jurisdiction.

The proceedings in the Illinois suit, as so certified, show that after the mandate of the Circuit Court of Appeals ordering a new trial in the Illinois case had been filed in the District Court there, the following proceedings took place in the latter court, according to its docket entries:

7-11-39	Filed Mandate U. S. C. C. A.—Judgment Dist. Court reversed. J. S. 5.
1- 4-40	By agt. of counsel above cause set for trial Jan. 31st, 1940—10 A. M. Woodward, J.
1- 8-40	Mailed notice to Attys.
1-31-40	Cause called for trial—dismd. for want of prosecution. No costs. (JS6) Woodward, J.

Said docket entries are in accordance with the certified copy of the order of dismissal entered by Judge Woodward (since deceased) in the Illinois suit on January 31, 1940, which order read:

> This cause being called for trial and the Plaintiff failing to prosecute its suit in this behalf IT IS ORDERED by the Court that this suit be and hereby is dismissed for want of prosecution without costs therefore IT IS CONSIDERED by the Court that the Defendant go hence without day and without its costs.

Whether or not said order and docket entries correctly state that the case in Illinois was called for trial, etc., cannot be impeached in this court by the affidavit of the Bank's

attorney in the Illinois suit. Besides, even accepting as true the statements made in said affidavits as to what occurred in connection with the dismissal of the
42 Illinois suit, it is apparent therefrom that the order of dismissal entered by Judge Woodward was unsatisfactory to the Bank's attorney and therefore amounted to an involuntary dismissal of the case, within the meaning of Federal Rule 41(b).

In support of the authority of the District Court in Illinois to dismiss the prior suit of its own motion, the Government cites the decision of our Court of Appeals in *Bargar v. Baltimore & Ohio Railroad Company,* decided April 20, 1942, 130 F. 2d 401.

In that case, after pointing out that (disregarding a prior suit in Pennsylvania) the complaint in the first suit here had been twice stricken from the files and no further proceedings taken; that at one time the appellant had three separate suits pending against the same defendant based upon the same claim; and that the default in prosecution had extended for over a year, the Court of Appeals said:

> Under such circumstances the court was justified in dismissing the suit, either under Rule 41(b) of the new rules, which authorizes dismissal of an action for failure to prosecute on motion of the defendant, and the obvious purpose of which is to prevent unnecessary harassment and delay in litigation; or under the inherent power of a court to dismiss for failure to prosecute or want of diligence, a power which the court may exercise of its own motion. * * *

It will be noted that Rule 41(b) applies not only to the dismissal of an action on motion of the defendant, but also to "any dismissal not provided for in this rule." Hence the dismissal of a case by a District Court of its own motion operates as an adjudication upon the merits, unless the court in its order of dismissal otherwise specifies.

CONCLUSION.

For the reasons stated in my original and this supplemental report, the plaintiff Bank cannot maintain the present suit so long as the order of dismissal in the Illinois suit remains unqualified.

However, according to the decision of the District
43 Court for the Southern District of New York in *Cavallo v. Agwilines, Inc.*, rendered October 22, 1942, 159 D. J. Bull. 59; 2d F. R. D. 526, it would still seem to be possible for the plaintiff Bank to have the order of the District Court in Illinois dismissing the prior suit modified so as to be without prejudice.

I suggest therefore that—since the interests of an incompetent veteran are involved in this litigation—the Court give the plaintiff Bank 30 days in which to obtain a modification of the order of dismissal entered in the Illinois suit; failing in which, this suit should be dismissed.

Respectfully submitted,

WILLIAM R. HARR,
Commissioner of Veterans' Cases.

cc Warren E. Miller,
Attorney for Plaintiff.
Edward M. Curran,
United States Attorney,
c/o Major Joseph H. San.

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44 **Order and Judgment Sustaining Defendant's Motion for Summary Judgment.**

(Filed June 16, 1943.)

The above entitled cause came on to be heard on the 16th day of June 1943, being submitted to the Court upon defendant's motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and upon

the affidavit of James B. Spell, with exhibits attached to the said motion, and upon the plaintiff's complaint and the defendant's answer filed herein on February 11, 1941 and May 27, 1941, respectively, and upon points and authorities filed herein, together with the reports and recommendations of the Commissioner of Veterans' Cases filed herein on March 2, 1943 and April 26, 1943, respectively, and oral argument, and the Court being fully advised in the premises finds that there is no genuine issue as to any material fact that the Court is without jurisdiction to entertain this action, and that the defendant is entitled to judgment dismissing the plaintiff's complaint, it is therefore,

45 ORDERED, ADJUDGED AND DECREED that the defendant's said motion be and the same hereby is in all respects granted and that the complaint of the plaintiff be and the same hereby is dismissed, and the defendant, United States of America, be and hereby is granted judgment accordingly.

F. DICKINSON LETTS,
Justice.

No objection as to form:
Warren E. Miller,
1343 H. Street, N. W.,
Washington, D. C.,
Attorney for Plaintiff.

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46 **Notice of Appeal.**

(Filed July 9, 1943.)

Notice is hereby given this 9th day of July, 1943, that American Bank & Trust Co. of Chicago, conservator of the estate of George Thornton Thompson hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of June, 1943 in favor of the United States of

America against said American Bank & Trust Co. of Chicago conservator of George Thornton Thompson.

WARREN E. MILLER,
Attorney for Plaintiff.

Edward M. Curran,
U. S. Attorney,
Attorney for Defendant,
U. S. Court House.

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47 **Order Extending Time for Filing Record.**

(Filed Aug. 18, 1943.)

Upon application of plaintiff, consented to by defendant, it is by the Court this 18th day of August, 1943,

ORDERED, that the time for the plaintiff to file record in this cause in the United States Court of Appeals for the District of Columbia be, and the same hereby is, extended to and including September 27, 1943.

T. ALLEN GOLDSBOROUGH,
Justice.

I Consent:
Edward M. Curran,
United States Attorney,
Attorney for Defendant.
Presented by
Warren E. Miller,
Attorney for Plaintiff,
1343 H. St., N. W.

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48 **Designation of Record.**

(Filed Aug. 11, 1943.)

Comes now plaintiff (Appellant) in the above entitled cause, by counsel, and designates the record on appeal in this case as follows:

1. Complaint filed 1-27-41.
2. Answer filed 5-27-41.
3. Certified copy of order of U. S. District Court dated January 31, 1940, filed in this court on May 27, 1941.
4. Defendant's motion for summary judgment and affidavit filed January 7, 1943.
5. Affidavit of Stephen A. Cross, filed April 16, 1943.
6. Order and judgment sustaining Defendant's motion for summary judgment.
7. Notice of Appeal, together with
8. This designation.

WARREN E. MILLER,
1343 H. St., N. W.,
Washington, D. C.,
Attorney for Plaintiff.

Service of a copy of the foregoing Designation of Record acknowledged this 10th day of August, 1943.

EDWARD M. CURRAN,
United States Attorney,
Attorney for Defendant.

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49 **Counter Designation of Record by Appellee.**

Comes now the defendant (Appellee) in the above entitled cause, by Edward M. Curran, United States Attorney, and D. Vance Swann, Attorney, Department of Justice, and in addition to the designation of record filed herein by plaintiff (Appellant) on August 10, 1943, designates the additional documents to be included in the record on appeal in this case as follows:

1. Report of Commissioner of Veterans' Cases of March 2, 1943.
2. Supplemental report of Commissioner of Veterans' Cases filed April 26, 1943.

3. Exhibits A, B, C, and D attached to defendant's motion and affidavit for summary judgment and referred to as defendant's designation No. 4. (In all probability the affidavits above referred to are to be regarded as a part of defendant's motion for summary judgment and affidavit filed on January 7, 1943.)
4. This designation.

EDWARD M. CURRAN,
United States Attorney,

D. VANCE SWANN,
Attorney, Department of Justice,

Attorneys for Defendant.

Service of a copy of the foregoing Counter Designation of Record is acknowledged this 13th day of August, 1943.

WARREN E. MILLER,
1343 H. Street, N. W.,
Washington, D. C.,
Attorney for Plaintiff.

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Conservator of the Estate of GEORGE T. THOMPSON, Incompetent, Petitioner	)	FILED JAN 7 1943 CHARLES E. STEWART, Clerk
-vs-	)	No. 44091
UNITED STATES OF AMERICA, Defendant.	)	

PETITION - WAR RISK INSURANCE

Petitioner complains of the above named Defendant and for cause of action alleges:

I.

That the Petitioner, AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a corporation, is the duly appointed, qualified and acting Conservator of the Estate of GEORGE T. THOMPSON, Incompetent, and that said incompetent is a citizen of the United States of America, and a resident of the Northern District of Illinois, Eastern Division, and of the City of Chicago, and County of Cook therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, A. D. 1917 and the World War Veterans' Act of June 7, A. D., 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to GEORGE T. THOMPSON by the Defendant.

III.

That on or about August 22, 1918 GEORGE T. THOMPSON entered the armed forces of the Defendant; that he served the Defendant as a private from the 22nd day of August, A. D. 1918 until the 16th day of December, 1918, when he washonorably discharged from the service and during all of said time he was employed in the active service of the Defendant.

Def's Ex. A

That shortly after entering the Defendant's service, he, the said GEORGE T. THOMPSON, made application for and was granted insurance in the sum of TEN THOUSAND DOLLARS ($10,000.00) by the Defendant, who thereafter issued to the said GEORGE T. THOMPSON, Certificate or policy No. of his compliance with said acts so as to entitle him and his beneficiaries to the benefits of said acts and the rules and regulations of said Bureau and the Directors thereof; and that during the term of his said service the Defendant deducted from his pay for services the monthly-premium provided for by said acts and the rules and regulations promulgated by the Defendant and premiums thereon were paid by the veteran promptly when the same came due until after his discharge.

V.

That while serving the Defendant as aforesaid, the said GEORGE T. THOMPSON contracted certain diseases, injuries and disabilities resulting in and known as PSYCHOSIS, MANIAC DEPRESSIVE, RHEUMATISM MUSCULAR, URETHRITIS CHRONIC, DEMENTIA PRAECOX and other disabilities as shown by the United States Veterans' Bureau file.

VI.

That said diseases, injuries and disabilities continued from since to-wit December 16, 1918 and rendered the said GEORGE T. THOMPSON wholly unable to follow any substantially gainful occupation and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it was and is reasonably certain that they will continue throughout the veteran's lifetime in approximately the same degree, and the said GEORGE T. THOMPSON is now rated by the United States Government aspermanently and totally disabled; and that said GEORGE T. THOMPSON was from and since the date of his discharge, to-wit, December 16, 1918 and continuously until this date totally and

permanent disabled by reason of and as a direct and proximate result of such disabilities above set forth.

VII.

That on or about the 3rd day of June, A. D. 1931 STRAUS NATIONAL BANK AND TRUST COMPANY the then Conservator of the Estate of said GEORGE T. THOMPSON, made claim to the United States Veterans Bureau for payment of said War Risk Insurance and said claim was thereafter pending and on, to-wit, the 5th day of March, A. D. 1935, the Director of Insurance directed a letter to this Plaintiff as Conservator of the Estate of said GEORGE T. THOMPSON, advising him that a decision was rendered on February 27, A. D. 1935 by the Insurance Claims Council denying said claim and thereafter on to-wit July 11, 1935 the AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Conservator of said GEORGE T. THOMPSON, directed an appeal to the Administrator of Veterans Affairs and on, to-wit, October 16, A. D. 1935, a formal appeal was filed with the Administrator of Veterans Affairs appealing from the decision of the Insurance Claims Council wherein a claim for insurance was denied and afterwards on, to-wit, November 13, A.D. 1935, the Board of Veterans Appeals, acting for and on behalf of the Administrator of Veterans Affairs, affirmed the decision of the Insurance Claims Council, which said decision the said Board of Veterans Appeals advised the Plaintiff herein constituted a final administrative denial of the claim, so that a disagreement now exists between your Petitioner and the Veterans Administration as to GEORGE T. THOMPSON's claim under said contract of War Risk Insurance.

VIII.

That under the provisions of said acts and other acts amendatory thereof the Petitioner is entitled to the payment of FIFTY SEVEN AND 50/100THS DOLLARS ($57.50) for each and every month transpiring since, to-wit, the 16th day of December, A. D. 1918, no part of which has been paid, and that

said money is now due to Petitioner herein and in addition thereto the sum of FIFTY SEVEN AND 50/100THS ($57.50) DOLLARS each and every month hereafter so long as the beneficiary of said insurance, the said GEORGE T. THOMPSON, shall live, and if he should die before two hundred forty (240) installments of said insurance have been paid, his beneficiary, as shown by the Government records, will be entitled to the payment of FIFTY SEVEN and 50/100THS DOLLARS ($57.50) per month until two hundred and forty (240) installments have been paid.

IX.

That Petitioner has employed the services of CROSS AND CROSS, attorneys and counsellors at law, duly licensed and admitted to practice before this Court, and all courts of the State of Illinois. That a reasonable attorneys' fee to be allowed to Petitioner's attorneys for their services in this action would be ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924, as amended.

X.

Wherefore, your Petitioner prays judgment as follows:

FIRST: That Petitioner have judgment against the Defendant that the said GEORGE T. THOMPSON became totally and permanently disabled on or prior to December 16, A. D. 1918 and which was while his insurance was in full force and effect.

SECOND: That Petitioner recover of and from the Defendant an amount equal to FIFTY SEVEN AND 50/100THS DOLLARS ($57.50) for each and every month from and after the date on which the said GEORGE T. THOMPSON became totally and permanently disabled during the life of his said insurance to the date of payment and FIFTY SEVEN AND 50/100THS DOLLARS ($57.50) thereafter so long as GEORGE T. THOMPSON shall live.

THIRD: Fixing and determining the fee to be paid to CROSS AND CROSS, attorneys for their services in this action.

Cross & Cross
Attorneys for Petitioner.

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

JOHN C. HIRSCHFELD being first duly sworn says that he is the Assistant Secretary and Trust Officer of the AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Petitioner herein, that he has read the foregoing petition by him subscribed; knows the contents thereof; and that the same is true to his best knowledge, information and belief.

Subscribed and sworn to before me this 20th day of November, A. D. 1935.
Kathryn A. Hammond.
Notary Public.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

FILED
JAN 7 1943
CHARLES E. STEWART,
Clerk

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Conservator of the Estate of GEORGE T. THOMPSON, Incompetent, Petitioner,	)	
vs.	)	Law No. 44981
UNITED STATES OF AMERICA, Defendant.	)	

ANSWER

Now comes the defendant in the above entitled cause, by its attorney of record, Michael L. Igoe, United States Attorney, and William M. Lytle, Attorney, Department of Justice, and for answer to the petition in this cause, alleges:

I.

The defendant denies for want of information or belief that the American National Bank and Trust Company of Chicago, a corporation, is the duly appointed, qualified and acting administrator of the estate of George T. Thompson, and that George T. Thompson is a citizen of the United States of America, a resident of the Northern District of Illinois, Eastern Division, and of the city of Chicago, and of the County of Cook therein.

II.

The defendant admits that this action is brought under and by virtue of the terms of the War Risk Insurance Act of October 6, A. D. 1917, and of the World War Veterans' Act of June 7, A. D. 1924, and amendatory Acts thereto, and that it is based upon a contract of war risk yearly renewable

term insurance, issued under the said Acts, to George T. Thompson by the defendant.

III.

The defendant admits that George T. Thompson entered the armed military forces of the defendant on August 22, 1918, and was discharged therefrom on December 16, 1918, and that during the period of said enlistment, the said George T. Thompson was employed in the active military service of the defendant.

IV.

The defendant admits that while in the military service of the United States, during the aforesaid enlistment, that George T. Thompson applied for and was granted by the defendant, a war risk yearly renewable term insurance contract in the principal sum of $10,000, and that, by its terms, payment of the benefits of said insurance contract was predicated upon the death or permanent and total disability of the insured, while the contract of insurance was in full force and effect. The defendant further admits that premiums on the said contract of war risk yearly renewable term insurance were deducted from the insured's monthly military service pay from the date the said contract of insurance was applied for and granted to him, namely, on October 3, 1918, up to and including the month in which he was discharged from military service, namely, December 1918, but states that no premiums were paid thereafter, and the said insurance contract, therefore, lapsed for non-payment of premiums on January 1, 1919, and ceased to be in full force and effect at the expiration of the thirty-one days' grace period at midnight of January 31, 1919.

V.

The defendant denies that while in the military service of the United States, during the said enlistment, that the said insured, George T. Thompson, contracted certain diseases, injuries,

and disabilities resulting in and known as : "psychosis, manic depressive, rheumatism, muscular, urethritis, chronic, dementia praecox, and other disabilities as shown by the United States Veterans' Bureau file."

VI.

The defendant denies that the said diseases, injuries and disabilities, or any other diseases, injuries and disabilities were suffered by the said George T. Thompson on December 16, 1918, or any other date when his said insurance contract was in full force and effect, and rendered him wholly unable to follow any substantially gainful occupation, and denies that any diseases, injuries or disabilities were, when his insurance contract was in full force and effect, of such a nature and founded upon such condition that they were reasonably certain to continue throughout his lifetime in any degree whatsoever. Defendant further denies that the said George T. Thompson was from and since the date of his discharge from his said enlistment in the military service of the United States, on to-wit, December 16, 1918, and has been continuously from then until this date, totally and permanently disabled by reason of and as a direct and proximate result of any disability of any nature whatsoever, and more particularly, the diseases, injuries and disabilities hereinbefore referred to.

VII.

The defendant admits that a claim for insurance benefits under the said contract of insurance was filed in and with the United States Veterans' Bureau and/or Administration, on June 3, 1931, by the Straus National Bank and Trust Company, who described themselves as conservator of the estate of the said George T. Thompson; the defendant admits that said claim was denied by the Insurance Claims Council of the United States Veterans' Bureau

on February 27, 1935, that a letter of notification of such denial was dispatched to the said American National Bank and Trust Company of Chicago by registered mail on March 5, 1935, from Washington, D. C., that an appeal to the administrator of Veterans' Affairs from the said decision by the Insurance Claims Council, dated July 9, 1935, was received by the United States Veterans' Bureau on July 13, 1935, and that the said appeal was denied by the Administrator's Board of Appeals on November 13, 1935, and notification thereof dispatched to the petitioner at Chicago by registered mail on November 13, 1935.

VIII.

The defendant denies the allegations contained in this paragraph of the petition in their entireties.

IX.

The defendant admits that the petitioner has employed the services of Cross and Cross, attorneys and counsellors at law, and that they are duly licensed to practice before this court, and that a reasonable attorneys' fee, in the event of a recovery by the petitioner in this lawsuit, would be ten percent of the amount of judgment recovered.

WHEREFORE, having fully answered, defendant prays that the petitioner take nothing by this action, that judgment be entered for the defendant and against the petitioner with costs, and for such other and further relief as may to the Court seem meet and proper, the premises considered.

MICHAEL L. IGOE,
United States Attorney.

WILLIAM M. LYTLE,
Attorney, Department of Justice.

DOCKET War Risk Insurance

TITLE OF CASE	ATTORNEYS
AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Conservator of the Estate of GEORGE T. THOMPSON, Incompetent.	For Plaintiff: Cross & Cross, 852 - 10 So. La Salle St.
vs	For Defendant:
UNITED STATES OF AMERICA	William S. Campbell, U.S. Atty.

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED	DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED
11-30-35	C+C	10 00					
JAN 8 1936	DEC. REPORT		5 00				
SEP 30 1936	SEPT. REPORT		5 00				
10-10-37	C+C Appeal	5 00					
11-25-38	C+C Brief	5 00					
DEC 31 1938	DEC. REPORT		10 00				
7-15-39	C+C Appeal	5 00					
SEP 30 1939	SEPT. REPORT		5 00				
		25 00	25 00				

ABSTRACT OF COSTS	
TO WHOM DUE	AMOUNT

RECEIPTS, DISBURSEMENTS, ETC.

JUDGE WOODWARD

21

44981

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
Nov 30/35	Filed Petition	5 00		
" " "	" Security for Costs			
" " "	" Notice and Affidavit			
Dec 2 "	Prepared report			
				5 00
10-29-37	Set for trial May 7th 1938 [illegible] Wednesday			
5-9-38	Held on the trial call for [illegible]			
	[illegible] - Wednesday			
5-14-38	Filed [illegible] & [illegible] subpoena + 5 [illegible]			
5-17-38	Filed [illegible] of [illegible]			
" "	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	Testimony heard and jury to [illegible]			
	until May 14th 1938 - 10 [illegible] Wednesday			
" "	3 witnesses for [illegible] sworn			
" "	Filed [illegible] to strike			
" "	[illegible] to strike parts of petition [illegible]			
	+ [illegible] filed - Wednesday			
" "	Filed [illegible] of [illegible]			
" "	Ordered [illegible] subpoena [illegible]			
	[illegible] - Wednesday			
" "	Filed [illegible] subpoena + [illegible]			
5-18-38	Filed [illegible] for [illegible]			
" "	" [illegible]			
" "	" [illegible]			
" "	Testimony heard and [illegible]			
	[illegible]			
	[illegible]			
	Testimony heard [illegible]			
" "	[illegible]			
	[illegible]			
	Arguments heard and [illegible]			
	[illegible] court instructs the jury - [illegible]			

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
5-18-38	retire for deliberation -			
	Verdict: We the jury find the issue			
	for the defendant - [illegible]			
	Plaintiff excepted. Exception			
	Mo. in arrest of judgment overruled			
	exception -			
	Judgment on the verdict for cost			
	in favor of the deft & against the			
	Pltff. exception -			
	90 days for Bill of exceptions - Woodward J.			
" " "	2 witnesses for pltff - 12 witnesses for			
	deft. Groom			
" " "	Filed Verdict			
	Pltf [illegible]			
5-26-38	Order denying mo. for new trial			
	record & extending mo. in arrest of judgment			
	as vacated & set aside - Judgment on the			
	Verdict for costs is vacated - set aside			
	& mo. pltff for new trial is set for			
	June 17-1938 - [illegible] Bill of exc.			
	in 90 days - Woodward J.			
5-27-38	Filed subpoena with service fee .50			
" " "	- 0.96			
6-7-38	Filed return of [illegible] service fee 2.00			
6-17-38	Arguments heard on motion of			
	pltff for new trial taken under			
	advisement - Woodward J.	JUN 30 1938	Cu	5.00
7-15-38	Filed Memorandum by Judge Woodward			
" " "	By the Court - Mo. for new trial overruled			
	exc. by pltff - Mo. in arrest of judgment			
	overruled exc. by pltff -			
	Judgment on the verdict that the pltff			
	take nothing by its suit and that the			
	deft go hence without day - [illegible]			
	Judgment that the deft recover its			[illegible]
	costs to be taxed by the Clerk -			
	Bill of exceptions may be presented			

44981

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
7-15-38	within 90 days - Woodward J			
	JSb			
7-19-38	Iss. 2 cer. copies Judgment to U.S. Atty		1 90 US	
	SEP 30 1938			5 00
10-10-38	Filed Notice of Appeal of pltff to U.S. C.C.A.	5 00	CE	1 90
" " "	" Praecipe for Record			
" " "	" Bond on Appeal			
10-11-38	Mailed notice of Appeal to U.S. Atty			
" " "	Bill of Exceptions presented - approved			
	signed and filed. Woodward J			
" " "	Filed Bill of Exceptions + copy			
10-14-38	Notice of order sub 101..138 sent to all attys.			
11-25-38	Transcript	5 00		
	DEC 31 1938			10 00
7-11-39	Filed Mandate U.S.C.C.A. - Judgment			
	Dist. Court reversed. JSS	5 00		
	SEP 30 1939			5 00
1-4-40	By agt of counsel above cause set			
	for trial Jan 31st 1940 - 10 AM. Woodward J			
1-8-40	MAILED NOTICE TO ATTYS.			
1-31-40	Cause called for trial - dismissed for			
	want of prosecution - No costs. (JSL)		5 00	1-11-39
	Woodward J.			
	JSb			
2-2-40	MAILED NOTICE TO ATTYS.			
2-5-40	Iss. 2 cer. copies order of dismissal to U.S. Atty		1 30 US	

Defendant's Exhibit D.

(Filed Jan. 7, 1943.)

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.
EASTERN DIVISION.

January 31, 1940.

Present: Hon. Charles E. Woodward,
Judge.

AMERICAN NATIONAL BANK AND TRUST CO. OF CHICAGO, Conservator of the Estate of GEORGE T. THOMPSON, Incompetent, vs. UNITED STATES OF AMERICA.	No. 44,981.

This cause being called for trial and the plaintiff failing to prossecute its suit in this behalf:

It is ordered by the Court that this suit be and hereby is dismissed for want of prossecution without costs therefore it is considered by the Court that the defendant go hence without day and without its costs.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 18 1944

Joseph W. Stewart
CLERK

No. 8610

United States Court of Appeals

DISTRICT OF COLUMBIA

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, CONSERVATOR OF THE ESTATE OF GEORGE THORNTON THOMPSON, INCOMPETENT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

EDWARD M. CURRAN,
United States Attorney.

FRANCIS M. SHEA,
Assistant Attorney General,

LESTER P. SCHOENE,
Director, Bureau of War Risk Litigation,

WILBUR C. PICKETT,
Assistant Director, Bureau of War Risk Litigation,

KEITH L. SEEGMILLER,
Attorney, Department of Justice.

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Argument	3
The final judgment in the earlier litigation on the claim here sued on has the effect of an adjudication on the merits, barring appellant's right to maintain this suit	3
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CITATIONS

Cases:

Barger v. *Baltimore & O. R. Co.*, 130 F. (2d) 401	4
Carnegie National Bank v. *City of Wolf Point*, 110 F. (2d) 569	4
Derrin v. *United States*, 41 Fed. Supp. 530	4
Hicks v. *Bekins Moving & Storage Co.*, 115 F. (2d) 406	4
Hill v. *Wampler*, 298 U. S. 460	4
In re Crosby Stores, 65 F. (2d) 360	4
Lyon v. *Perin Manufacturing Co.*, 125 U. S. 698	4
Partridge v. *St. Louis Joint Stock Land Bank*, 130 F. (2d) 281	4
Perlman v. *322 West 72nd Street Co., Inc.*, 127 F. (2d) 716	4

Statute:

Sec. 19, World War Veterans' Act (38 U. S. C. 445–445d)	3, 5

Miscellaneous:

Rule 41 of the Federal Rules of Civil Procedure	2, 3, 4, 6
Rule 56 (b) of the Federal Rules of Civil Procedure	2
Rule 86 of the Federal Rules of Civil Procedure	2, 6

568981—44

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 8610

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, CONSERVATOR OF THE ESTATE OF GEORGE THORNTON THOMPSON, INCOMPETENT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTERSTATEMENT OF THE CASE

The claim for yearly renewable term insurance benefits upon which the appellant sues was the subject of earlier litigation between the same parties in the United States District Court for the Northern District of Illinois, and in the United States Circuit Court of Appeals for the Seventh Circuit. The Government's answer asserts the defense, *inter alia,* that the final judgment in such earlier litigation constituted a complete adjudication of the claim against the plaintiff (R. 5–6).[1] The Government filed an affidavit setting forth the facts as to the prior litigation (R. 8–9), and moved for summary judgment (R. 7–8). The District Court sustained the motion and entered judgment for the Government (R. 26–27), from which this appeal was taken (R. 27–28).

[1] Record references are to the Appendix to Appellant's Brief.

In the Illinois litigation, a judgment for the Government, entered in the District Court, was reversed by the Circuit Court of Appeals, and the case was remanded for a new trial. Thereafter, it is shown by the record of the Illinois District Court, the following proceedings were had:

> 7–11–39. Filed Mandate U. S. C. C. A.—Judgment Dist. Court reversed, J. S. 5.
>
> 1–4–40. By agt. of counsel above cause set for trial Jan. 31st, 1940—10 A. M. Woodward, J.
>
> 1–8–40. Mailed notice to Attys.
>
> 1–31–40. Cause called for trial—dismd. for want of prosecution. No costs. (JS6) Woodward, J.
>
> 2–2–40. Mailed notice to Attys.
>
> 2–5–40. Iss. 2 cer. copies order of dismissal to U. S. Atty. (R. 16–17.)

The order of dismissal entered on January 31, 1940, reads as follows:

> This cause being called for trial and the Plaintiff failing to prosecute its suit in this behalf IT IS ORDERED by the Court that this suit be and hereby is dismissed for want of prosecution without costs therefore IT IS CONSIDERED by the Court that the Defendant go hence without day and without its costs (R. 6).

The present suit was instituted in the District of Columbia on January 27, 1941. (R. 1.)

POINT RELIED UPON BY THE APPELLEE

The order dismissing the appellant's suit in the Illinois Court has the effect of an adjudication upon the merits under the provisions of Rule 41 (b) of the Federal Rules of Civil Procedure.

PERTINENT RULES OF COURT

Rule 41 of the Federal Rules of Civil Procedure is primarily involved in this case. Rules 56 (b) and 86 have incidental bearing upon the question to be decided. All appear in the appellant's brief at pp. 4–5.

SUMMARY OF ARGUMENT

In an earlier suit against the Government upon the claim here asserted, in the United States District Court for the Northern District of Illinois, the plaintiff (appellant here) failed to appear for trial on the date set for trial, and an order of dismissal for failure to prosecute was entered on January 31, 1940. Under Rule 41 (b) of the Federal Rules of Civil Procedure, that order operates as an adjudication upon the merits of the claim, and constitutes a complete bar to maintaining the present suit.

The record of the Illinois Court, showing dismissal of the character above stated, is conclusive here and it may not be shown by extrinsic evidence that it does not truly reflect the court's rulings. But, if it were permissible to resort to extrinsic evidence, that offered by the appellant tends to support the judgment appealed from.

Appellant asserts that the case is governed by an exception in a limitation statute. But, the judgment appealed from rests upon *res judicata,* the limitation statute is not invoked by the Government, and limitations would be inapplicable in any event because, upon the facts before the court, the insanity of the insured prevents the running of limitations against him. Hence, for lack of any limitations question, no effect can be given to a provision rendering limitations inoperative in certain cases.

Although the Illinois suit was instituted before the effective date of the Federal Rules of Civil Procedure, the final order in that suit, entered after the effective date of such rules, is governed by them since neither a holding nor any sound ground for a holding that injustice would result, is shown.

ARGUMENT

The final judgment in the earlier litigation on the claim here sued on has the effect of an adjudication on the merits, barring appellant's right to maintain this suit

1. The record of the proceedings in the Illinois Court shows that, on January 4, 1940, the case was set for trial on January

31, 1940, and that it was called for trial on the latter date, at which time "the Plaintiff failing to prosecute * * * this suit be and hereby is dismissed for want of prosecution" (R. 6). A dismissal upon that ground, whether upon motion of the defendant or upon the court's own motion, is an involuntary dismissal of a character provided for by Rule 41 (b) of the Federal Rules of Civil Procedure and, absent any provision in the order to the contrary, has the effect of an adjudication on the merits of the claim. *Carnegie National Bank* v. *City of Wolf Point,* 110 F. (2d) 569, 572 (C. C. A. 9); *Derrin* v. *United States,* 41 Fed. Supp. 530 (D. C. Oregon). Cf. *Partridge* v. *St. Louis Joint Stock Land Bank,* 130 F. (2d) 281 (C. C. A. 8); *Perlman* v. *322 West 72nd Street Co., Inc.,* 127 F. (2d) 716, 718 (C. C. A. 2).

It is well established, of course, that a federal court has inherent power to dismiss a suit for lack of prosecution, which it may exercise of its own motion. *Barger* v. *Baltimore & O. R. Co.,* 130 F. (2d) 401, 402 (App. D. C.); *Hicks* v. *Bekins Moving & Storage Co.,* 115 F. (2d) 406, 408 (C. C. A. 9). If the dismissal entered in the Illinois Court be regarded as upon the defendant's motion, it is expressly provided for by the first sentence of Rule 41 (b). If it be regarded as a dismissal upon the court's own motion, not specifically provided for by the rule, it is embraced by the general clause "any dismissal not provided for in this rule," contained in the last sentence of that rule.

2. In this suit, the record of the proceedings and judgment in the Illinois Court are conclusive, and it may not be shown by extrinsic evidence, such as the affidavit of counsel relied upon by appellant (R. 18–19; Br. p. 8), that something different was intended. *Hill* v. *Wampler,* 298 U. S. 460, 464; *Lyon* v. *Perin Manufacturing Co.,* 125 U. S. 698; *In re Crosby Stores,* 65 F. (2d) 360 (C. C. A. 2).

While it was timely recommended by the Commissioner of Veterans' Cases that appellant seek modification of the order of dismissal in the Illinois Court, to show that it was without prejudice (R. 26), no effort is shown to have been made to comply with the recommendation. It is stated in appellant's brief (p. 8) that such modification in the Illinois Court was

impossible because of the death of the judge who entered the order, implying that no other judge of that court would grant modification. Yet appellant, in effect, seeks modification of the order here as he did in the court below, although no grounds are stated for the view that modification of an order of the Illinois Court, impossible to obtain in that court, should be granted by a court in this jurisdiction. The attempt to show, by extrinsic evidence, that the record of the Illinois Court does not truly reflect the court's order, should have been made in that court and in that suit, we submit, and not in this court or the court below in the present case.

3. If it were permissible to do so, however, the Government would call to its aid the collateral proof—affidavit of Mr. Cross (R. 18–19)—which appellant placed in the record. It tends to show denial by the Illinois Court of the appellant's request for a dismissal "for reasons not affecting the merits" and, in lieu thereof, a dismissal for want of prosecution in accordance with the language of the order. Since the affidavit further shows consideration by the Illinois Court of the fact that the merits of the controversy had not been tried, it would demonstrate, if acceptable as proof in this case, that the court declined to rule that dismissal for want of prosecution did not affect the merits.

4. The question here is not one of limitations (see Appellant's Brief, pp. 6–7), but of *res judicata*. Clearly the limitations statute[2] upon which appellant relies confers no right upon any litigant—*sui juris* or under disability—to dismiss his suit without prejudice after service of the answer. However, under Rule 41 of the Federal Rules of Civil Procedure, a federal court may enter an order of dismissal having the effect of concluding the merits against a plaintiff failing to proceed with the trial on the date set for it, and a requirement that he elect between prosecution of the case and such an order denies him nothing but the power to dictate the time and place of trial, and to harass the defendant with a multiplicity of suits—a

[2] Section 19 of the World War Veterans' Act (38 U. S. C. 445–445d), part of which is quoted in Appellant's Brief, p. 3.

power obviously not conferred by the statute upon which appellant relies.

The statute provides an exception to the limitation, allowing a new suit within a year after dismissal of an earlier one, even though the general period of limitations has expired, provided that such dismissal was "for reasons not affecting the merits." The exception operates, under the circumstances stated in the statute, to avoid the bar of limitations—a matter not in dispute at the present time because the decision of the District Court rests upon *res judicata,* the Government does not invoke limitations, and the complaint alleges incompetency of the insured that would avoid the bar of limitations, in any event.

However, the exception does not destroy the doctrine of *res judicata* and, hence, is inapplicable to the Government's contention here that, although there was no trial and determination on the merits of the claim, the order of dismissal was of a character that "operates as an adjudication upon the merits." The dismissal in the Illinois Court was for a reason affecting the merits.

5. While the Illinois suit was instituted prior to the effective date of the Federal Rules of Civil Procedure, the final order of dismissal was entered there after those rules became effective, and is governed by them in the absence of any determination by the court that application of the new rules would work an injustice. See Rule 86. Moreover, since the circumstance is shown by the record to be only that the plaintiff chose not to proceed with the trial of its case on the day set for the trial, application of Rule 41 merely denied to the plaintiff a preferred position upon the sole ground that the institution of his suit antedated the new rules. The appellant makes no claim that any sound ground was urged in the Illinois Court, or even existed, for excusing its failure to proceed with the trial on the date set, for granting dismissal without prejudice or for denying application of the new rules. Hence, it would not appear that any injustice resulted even if the question were open for determination by this court.

It seems clear, however, that injustice warranting exemption of a particular case from application of the new rules must be determined by the district court having jurisdiction in the

case. We assume that such a determination would be reviewable upon direct appeal for abuse of discretion, but certainly, we submit, whether application of the new rules in a suit in Illinois worked an injustice requiring application of the old procedure, cannot be determined in this proceeding in this court, as the appellant seems to contend (Br. p. 9).

CONCLUSION

It is respectfully submitted that the judgment of the District Court is correct and should be affirmed.

EDWARD M. CURRAN,
United States Attorney.

FRANCIS M. SHEA,
Assistant Attorney General.

LESTER P. SCHOENE,
Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,
Assistant Director, Bureau of War Risk Litigation.

KEITH L. SEEGMILLER,
Attorney, Department of Justice.

JANUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

APPELLANT'S REPLY BRIEF

IN THE

United States Court of Appeals for the District of Columbia

No. 8610

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Conservator of the Estate of George Thornton Thompson, Incompetent
Appellant

v.

UNITED STATES OF AMERICA
Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
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IN THE

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Appellee, in its Summary of Argument, states appellant failed to appear for trial on the date this cause was set for trial, but the record here clearly shows appellant was represented by counsel who appeared when the previous suit was dismissed, and further that the previous suit was dismissed at plaintiff's instance. The uncontroverted affidavit of Stephen A. Cross, then attorney for plaintiff, shows the circumstances under which the case was dismissed in Illinois by stating: "* * * the plaintiff, in an informal manner, had asked that the suit be dismissed in advance of trial * * *".

It cannot be disputed that this case is governed by the following provisions of Section 19, World War Veterans' Act as amended July 3, 1930 (38 U. S. C. A., Sec. 445):

> "* * * If suit is seasonably begun and fails for defect in process, or *for other reasons not affecting the merits,* a new action, if one lies, may be brought within a year though the period of limitations has elapsed. * * *"

> "* * * Infants, *insane persons,* or persons under other legal disability, or persons rated as incompetent or insane by the Veterans' Administration *shall have three years in which to bring suit after the removal of their disabilities.* * * *" (Italics supplied.)

The Act of July 3, 1940, quoted above confers substantive rights upon this litigant which rights existed long before the Act of Congress was passed authorizing the promulgation of the Rules of Civil Procedure. The rights thus granted claimants to bring a new suit on the insurance contract, under the circumstances stated, is clearly as much a substantive one as the right granted them to bring the original suit. Hence, it follows that the disposition of this case depends upon the statutory construction of the above quoted provisions of the Act of July 3, 1930. This, irrespective of whether this Court should hold contrary to appellant's contention here, the dismissal of the Illinois suit was under Section 41(b) of the Rules of Civil Procedure.

This being a remedial statute for the benefit of a class, the rules of statutory construction applicable to such statutes should govern, and therefor appellant is entitled to a liberal construction of the statute in order to carry out the intent of the Congress. *United States* v. *Arzner,* 287 U. S. 470, 77 L. Ed. 436; *Westling* v. *United States,* 64 F. (2d) 454; *Johnson* v. *United States,* 9 Cir., 68 F. (2d) 588; *Denton* v. *City of Atchison,* 76 Kan. 89, 90 P. 764, 765; *Gaines* v. *City of New York,* 215 N. Y. 533, 109 N. E. 594, 596, L. R. A. 1917C, 203, Ann. Cas. 1916A, 259; *Claussen* v.

Amberg, 172 Okl. 197, 44 P. (2d) 92, 95; *Guest* v. *Atlantic Coast Line R. Co.,* 37 Ga. App. 102, 139, S. E. 97, 98; *Lamb* v. *Howard,* 150 Ga. 12, 102 S. E. 436, 437; *Ryan* v. *Piney Coal & Coke Co.,* 69 W. Va. 692, 73 S. E. 330, 331; *Siever* v. *Klots Throwing Co. of West Virginia,* 101 W. Va. 457, 132 S. E. 882, 885; *Hawkins* v. *Scottish Union & National Ins. Co.,* 110 Miss. 23, 69 So. 710, 712; *Coffin* v. *Cottle,* 16 Pick., Mass., 383, 385; *Mason* v. *Kansas City Belt R. Co.,* 226 Mo. 212, 125 S. W. 1128, 1129, 1130, 26 L. R. A., N. S., 914; *Pittsburgh C. C. & St. L. Ry. Co.* v. *Bemis,* 64 Ohio St. 26, 59 N. E. 745, 747.

In *Lamb* v. *Howard,* 150 Ga. 12, 102 S. E. 436, 437, the court said: "Section 4381 of the Civil Code is a remedial statute, and is to be liberally construed so as to preserve the right to renew the cause of action set forth in a previous suit, wherever the same had been disposed of on any grounds other than one affecting the merits."

There is a difference between a dismissal "* * * for reasons not affecting the merits" as provided by Section 19 quoted above, and an adjudication "upon the merits" as provided in Rule 41(b) of the Rules of Civil Procedure. The latter relates to a dismissal which finds its basis in the Rules of Civil Procedure, while the former statutory declaration, which conferred a substantive right long before the Rules of Civil Procedure were promulgated, contemplates a dismissal without an actual hearing on the merits of the controversy. There was no such hearing here and to apply the Rules of Civil Procedure relating to a dismissal "upon the merits" here, would abridge and modify the substantive rights which Congress had conferred upon this litigant.

Respondent, in its brief, relies solely upon Rule 41(b) of the Rules of Civil Procedure which Rules were enacted pursuant to the provisions of the Act of June 19, 1934 (Title 28 U. S. C. Para. 723(b) and 723(c)). This Act provides:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

The United States Circuit Court of Appeals for the 10th Circuit in *Dumas* v. *United States,* 103 F. (2d) 676, at p. 681, in construing that part of Section 19, World War Veterans' Act, 1924, as amended July 3, 1930, stated:

> "The World War Veterans' Act of 1924 and subsequent amendments thereto, and especially Section 19 thereof (Section 445, supra), manifests a settled policy on the part of Congress to prevent suits on war risk insurance policies seasonably commenced, to fail other than through a judgment on the merits."

In *United States* v. *Lund,* 76 F. (2nd) 723, the Court in construing Section 19, World War Veterans' Act, 1924, as amended July 3, 1930, so far as it relates to suits by insane persons stated:

> "We must construe this statute as a remedial one. Numerous uncertainties made this Congressional enactment (Section 445, par. 2, 38 U. S. C. A.) highly advisable, if not necessary. Until the amendment above quoted was enacted, there was no special statute of limitations which covered war risk insurance causes of action. The absence of a specific Federal statute on the subject, however, did not prevent the application of other state or Federal statutes. Doubtless, the resulting confusion induced Congressional action.
>
> "The limitations prescribed are liberal. It was evidently the intent of Congress to deal generously with war veterans who asserted claims growing out of war risk insurance policies. It is in this spirit that we must construe the last sentence which particularly provides that 'infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the Bureau shall have three years in which to bring suit *after the removal of their disabilities.*' "

Congress on June 29, 1936, (Public No. 844, 74th Cong.) 38 U. S. C. 445(d), in considering the administrative denial

of claims under Section 19 provided: "That the term 'denial of the claim' means the denial of the claim after consideration of its merits."

While this pertains to that part of Section 19, World War Veterans' Act of 1924, as amended, relating to the requisite "disagreement" as required by the statute in order for the Federal Courts to have jurisdiction of a controversy, nevertheless it shows an intention on the part of Congress that actual consideration of the merits of a claim be made administratively before courts are granted jurisdiction. There is even greater reason for requiring a hearing on the merits of a claim filed in court than when such claim is administratively considered by the Veterans' Administration, before further court action is barred. In the instant case, the record clearly shows that there was no hearing on the merits of this controversy before the District Court in Illinois, and no consideration at all was given by that court to the merits of this claim.

Conclusion

For the reasons stated, it is respectfully submitted that the Trial Court erred in sustaining the Motion for Summary Judgment, and in dismissing the Complaint; and the action of the lower court should be reversed.

Respectfully submitted,

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